

MWANZA v THE THE PEOPLE (1968) ZR 90 (HC)

HIGH COURT

DOYLE AG CJ

13th SEPTEMBER 1968

Flynote and Headnote

- [1] **Criminal procedure - Witnesses - Omission by trial magistrate to call a defence witness, effect of.**

If the trial magistrate omits to call a defence witness required by the accused, the conviction cannot stand.

- [2] **Animals - Government trophy - Duty to report possession to game officer - On whom duty falls - Section 36 of Fauna Conservation Ordinance construed.**

A game officer, for purposes of section 36 of the Fauna Conservation Ordinance, is not a "person" who must report the possession of a Government trophy to a game officer.

- [3] **Animals - "Government trophy" defined - Wounded animals killed by game officer - Section 35 of the Fauna Conservation Ordinance construed.**

A wounded animal killed by a game officer is not a "Government trophy" for purposes of section 35 of the Fauna Conservation Ordinance.

Statute construed:

Fauna Conservation Ordinance (Cap. 241), ss. 2 (1), 35, 36.

Mwanashi, for the appellant

Chigaga, State Advocate, for the respondents.

Judgment

Doyle Ag. CJ: These two appeals relate to the same matter and are taken together. The facts are simple. Both appellants are employed by the Game Department as game guards. On 17th June, 1967, the two appellants were together when Luwinya shot a wounded tsessebe, which is a game animal under Part I of the First Schedule to the Fauna Conservation Ordinance.

Some days later, in consequence of a report from his game scout, the game ranger found both appellants in possession of some 10 lb of the meat of the tsessebe. He questioned appellants who admitted killing the animal and excused themselves on grounds of appetite.

Both appellants were charged under section 36 of Cap.241 of failing to report possession of a Government trophy.

Section 36, omitting irrelevant words, reads as follows:

"Any person who by any means obtains possession of a Government trophy shall forthwith make a report thereof to the nearest . . . game officer . . . and any person who fails to comply with the provisions of this section shall be guilty of an offence."

It was the case for the People that no report was made forthwith. The defence was that a report had been sent by a carrier to the game scout, a man named Green Mwala. The latter denied receiving any such report although it was agreed by the game ranger that a report was made much later in the monthly report.

The learned magistrate took the view that no report was made forthwith by either appellants but that they only reported when found out. There was evidence to support this and if this were the only point at issue both appeals would have to be dismissed.

[1] Counsel for the People, however, states that in the case of Mwanza the learned magistrate omitted to call a defence witness required by the appellant and that therefore the conviction cannot stand. With this proper attitude I agree and on this ground the appeal would have to be allowed.

Mr Mwanashi however takes two further points. It was not made clear in the court below but it is accepted by counsel for the People here that the two appellants, being game guards, are game officers within the definition in section 2 of Cap. 241. [2] He further argues that the word "person" in section 36 cannot include a game officer who is the person to whom a report must be made. I agree with this contention. It seems to me that

the object of section 36 is to bring to the notice of the Game Department the existence of Government trophies and that it is not necessary for a game officer to make a report to himself or to any other game officer. Even if I am wrong in this, it still seems to me that the section was not contravened. The requirement is to report to the nearest game officer. In the case of each of these appellants, the nearest game officer was the other appellant who had full knowledge of the possession as they were together.

[3] The other point taken by Mr Mwanashi is that the meat of the tsessebe was not a Government trophy within the meaning of section 35 of the Ordinance. The animal was not found dead or killed in defence of life or property. If its meat is a Government trophy, it can only be so by reason of paragraphs (c) and (e) of section 35. Section 35 (c) refers to any animal killed or captured unlawfully and section 35 (e) refers to the meat of any such animal.

In this case counsel for the People agrees the animal was not killed unlawfully, as he accepts that it is part of a game guard's duty to kill wounded animals. There is no express provision in the Ordinance making it lawful for game officers to kill wounded animals. However, section 28 lays a duty on persons who wound animals to use all reasonable endeavours to kill them, and it goes on to require reports to game officers of wounding in certain circumstances.

I consider that it must be implied that a game officer has powers in certain circumstances, including at least wounded animals, to kill even though he has no licence.

It is probable that these appellants have broken some administrative directions of the Game Department, but for the reasons stated I do not consider that they have committed a criminal offence by contravening section 36 of Cap.241.

The appeals are allowed and convictions and sentences quashed.

Appeal allowed.